BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LETICIA MERA-HERNANDEZ	)	
Claimant	)	
VS.	)	Docket No. 1,061,514
	)	
USD 233	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent appealed the August 22, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard. C. Albert Herdoiza and Gary P. Kessler of Kansas City, Kansas, appeared for claimant. Kip A. Kubin of Leawood, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 21, 2012, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

At the August 21, 2012, preliminary hearing, claimant requested medical treatment. Respondent objected, claiming there was no employer-employee relationship between respondent and claimant. It also denied claimant's need for medical treatment. The parties agreed that if the ALJ ordered medical treatment, Dr. Vito J. Carabetta would provide that treatment.

On August 22, 2012, ALJ Howard issued an Order granting claimant's request for medical treatment and authorizing Dr. Carabetta to treat claimant conservatively. If claimant was determined to have reached maximum medical improvement by Dr. Carabetta, then he was to provide an impairment rating pursuant to the AMA *Guides*.[1]

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

By authorizing medical treatment, ALJ Howard implied there was an employer-employee relationship between respondent and claimant. Respondent appealed.

The issues are:

1. Did an employer-employee relationship exist between respondent and claimant on the date of accident?

2. If so, did the ALJ err in ordering medical treatment for claimant?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant's real name is Leticia Mera-Hernandez. The Application for Hearing she filed on July 11, 2012, indicates claimant's name is Leticia Mera-Hernandez a/k/a Hilda Reina and she has no Social Security number. At the preliminary hearing claimant testified she has no work permit allowing her to be employed in the United States. On January 29, 2009, claimant applied for a job with respondent using the name Hilda Reina. Claimant signed the application as Hilda Reina and listed a Social Security number. She testified she did so because of not having a Social Security number. Claimant also completed a Form I-9 Employment Eligibility Verification on May 18, 2009, and provided the same name and Social Security number she listed on her application for employment. She was hired as a custodian by respondent in May 2009.

Claimant testified she was moving furniture on March 1, 2012, when she injured her low back. She was immediately taken off work. Respondent admitted there was an accident and that claimant gave timely notice. Respondent sent claimant to Shawnee Mission Corporate Care (Corporate Care), where she received treatment, including physical therapy, before being referred to Dr. Zhengyu Hu. All of the records from Corporate Care list claimant's name as Hilda Reina.

Dr. Hu provided treatment for claimant from March 21, 2012, through June 1, 2012. His March 21, 2012, notes indicated, "I suspect the lumbar facet joint dysfunction in addition with muscle strength."[2] His treatment included medication, facet joint steroid injections and obtaining an MRI of claimant's lumbar spine. On June 1, 2012, Dr. Hu determined claimant had reached maximum medical improvement and could return to her regular duties effective June 4, 2012. His notes from that appointment indicate claimant was positive for five out of five Waddell's tests at a May 29, 2012, functional capacity

[2] P.H. Trans., Resp. Ex. A.

evaluation (FCE) claimant underwent. Dr. Hu's records and the FCE records indicate claimant's name was Hilda Reina.

On June 12, 2012, claimant went to see her personal physician, Dr. Michael Parra. In a July 27, 2012, written response to a letter from claimant's attorney, Dr. Parra opined that within reasonable medical certainty the accident of March 1, 2012, was the prevailing factor causing claimant's injury, present medical condition, and resulting impairment to her back and that claimant was in need of reasonable and necessary medical treatment. He recommended (1) physical therapy evaluation and treatment, (2) occupational therapy evaluation and treatment, (3) neurosurgery evaluation and treatment and (4) prescription medication.

PRINCIPLES OF LAW AND ANALYSIS

Respondent's entire brief is devoted to the issue of whether an employer-employee relationship exists between respondent and claimant. Respondent contends that no contract for employment existed on the date of accident as claimant used a false name to fraudulently induce respondent into entering a contract for employment. Because the employment contract was fraudulently induced, respondent asserts the employment contract is void ab initio.

In *Waxse*,[3] the Kansas Supreme Court set out the elements necessary to prove fraud and stated:

> The elements necessary to establish actionable fraud are well established. Fraudulent misrepresentation in an action to rescind an insurance contract includes an untrue statement of fact, known to be untrue by the party making it, made with the intent to deceive or recklessly made with disregard for the truth, where another party justifiably relies on the statement and acts to his injury and detriment. *American States Ins. Co. v. Ehrlich,* 237 Kan. 449, 452, 701 P.2d 676 (1985); *Nordstrom v. Miller*, 227 Kan. at 65. Fraud is never presumed and must be shown by clear and convincing evidence. *Gonzalez v. Allstate Ins. Co.,* 217 Kan. 262, 266, 535 P.2d 919 (1975). . . .

Pattern Instructions for Kansas (PIK Civ.3d) sets out the essential elements for actual fraud as follows:

> 1. That false (or untrue) representations were made as a statement of existing and material fact.
> 2. That the representations were known to be false (or untrue) by the party making them, or were recklessly made without knowledge concerning them.

---

[3] *Waxse v. Reserve Life Ins. Co.,* 248 Kan. 582, 586, 809 P.2d 533 (1991).

> 3. That the representations were intentionally made for the purpose of inducing another party to act upon them.
> 4. That the other party reasonably relied and acted upon the representations made.
> 5. That the other party sustained damage by relying upon them. PIK Civ.3d 127.40.

Respondent presented insufficient evidence that relying on claimant's representations that she was Hilda Reina resulted in it sustaining damages, injury or detriment. If an American worker was injured while working for respondent, rather than claimant, respondent would have been responsible for providing that worker with medical treatment and other benefits due under the Kansas Workers Compensation Act. The fact that claimant used a false name to obtain employment with respondent did not, in and of itself, result in respondent sustaining damages or causing respondent detriment.

In *Coma*,[4] the employee, an illegal alien, was fired and filed a claim for earned, but unpaid, wages. The employer argued that because the employee was an undocumented worker his employment contract was illegal. Therefore, the employee was not entitled to his unpaid wages. The Court granted the employee's claim for unpaid wages and stated,

> *Majlinger* [*v. Cassino Contracting Corp.*, 25 A.D.3d 14, 802 N.Y.S.2d 56 (2005)] also addressed the specific contract illegality issue: "As between the undocumented worker and the employer . . . there is a contract of employment, under which the worker is entitled to be paid for his or her work." 25 A.D.3d at 24. It found unpersuasive the case law barring recovery of damages for lost income gained from illegal activities, observing that "[a]n undocumented alien performing construction work is not an outlaw engaged in illegal activity, such as bookmaking or burglary [citations omitted]. Rather, the work itself is lawful and legitimate; it simply happens to be work for which the alien is ineligible or disqualified [citations omitted]." 25 A.D.3d at 29. The court held the undocumented worker was entitled to proceed with a loss of wages claim.[5]

As the Court stated in *Coma*, quoting *Majlinger*, the work itself performed by the employee was lawful and legitimate. In the present claim, claimant provided labor for respondent in return for wages. Both parties benefitted from this relationship. Simply put, the mere fact that claimant used a false name to obtain employment with respondent does not relieve respondent from its obligations under the Kansas Workers Compensation Act. This Board Member finds that at the time of claimant's accident an employer-employee relationship existed between respondent and claimant.

Respondent also contends the ALJ erred in awarding medical treatment based upon the opinion of Dr. Parra. The Board has jurisdiction to review decisions from a preliminary

---

[4] *Coma Corporation v. Kansas Dept. of Labor,* 283 Kan. 625, 154 P.3d 1080 (2007).

[5] *Id.*, at 641.

hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. K.S.A. 2011 Supp. 44-551(i)(2)(A). In addition K.S.A. 2011 Supp. 44-534a(a)(2) limits the jurisdiction of the Board to the specific jurisdictional issues identified. A contention that the ALJ has erred in his finding that the evidence showed a need for medical treatment is not an argument the Board has jurisdiction to consider. K.S.A. 2011 Supp. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.

The Board has considered this issue numerous times and has consistently ruled that the Board has no jurisdiction to review whether an ALJ erred in making a finding that the evidence showed a need for medical treatment.[6] Accordingly, this Board Member finds that the Board has no jurisdiction to review this issue.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

CONCLUSION

1. An employer-employee relationship existed between respondent and claimant.

2. The Board is without jurisdiction to consider whether the ALJ erred in awarding claimant medical treatment.

WHEREFORE, it is the finding of this Board Member that the August 22, 2012, Order entered by ALJ Howard impliedly finding an employer-employee relationship existed between respondent and claimant is affirmed. Respondent's appeal of the ordered medical treatment is dismissed.

IT IS SO ORDERED.

---

[6] See, e.g., *Green v. Disney Direct Marketing,* Nos. 262,422 & 262,423, 2004 WL 2382714 (Kan. WCAB Sept. 29, 2004); *Terrell v. Best Choice Delivery, Inc., and Terrell v. Mattress Firm,* No. 1,033,359 & No. 1,033,360, 2007 WL 2296152 (Kan. WCAB July 25, 2007); *Trent v. Drisco, LLC.,* Nos. 1,036,368 & 1,036,369, 2008 WL 375815 (Kan. WCAB Jan. 28, 2008).

[7] K.S.A. 2011 Supp. 44-534a.

[8] K.S.A. 2011 Supp. 44-555c(k).

Dated this ____ day of November, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

c: C. Albert Herdoiza and Gary P. Kessler, Attorneys for Claimant
albert7law@aol.com; kesslerlaw7@kc.rr.com

Kip A. Kubin, Attorney for Respondent
kak@kc-lawyers.com; cdb@kc-lawyers.com

Steven J. Howard, Administrative Law Judge